

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Clifford Brown Jazz Foundation)	
)	
Application for a New LPFM Station at)	File No. BNPL-20131114BPU
Berkeley, California)	Facility ID No. 197224

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 2014

Released: October 15, 2014

By the Commission:

1. The Commission has before it an Application for Review (“AFR”) filed by Clifford Brown Jazz Foundation (“CBJF”) on June 26, 2014. In the AFR, CBJF seeks review of the Media Bureau (“Bureau”) decision that affirmed the dismissal of its application submitted during the October 2013 Low Power FM (“LPFM”) filing window for a new station at Berkeley, California (“Application”).¹ The staff dismissed the Application – without providing CBJF the opportunity to amend – because it failed to meet the minimum spacing requirements of Section 73.807 of the Commission’s Rules (“Rules”)² and CBJF did not request a waiver of this rule.³

2. CBJF requests that the Commission reinstate the Application and allow it to file an amendment with a second-adjacent channel waiver request. It argues that prohibiting LPFM applicants to correct Section 73.807 defects, but allowing applicants in other broadcast services to file similar curative amendments, “does not comport with the directive” in Section 307(b) of the Communications Act of

¹ *Letter to Clifford Brown Jazz Foundation from James D. Bradshaw*, Ref-1800 (MB May 21, 2014) (“*Reconsideration Decision*”); *Letter to Clifford Brown Jazz Foundation from James D. Bradshaw*, Ref-1800 (MB Mar. 13, 2014) (“*Dismissal Letter*”).

² 47 C.F.R. § 73.807. As discussed in the *Dismissal Letter*, the Station’s proposed site was found to be 24.7 kilometers from the licensed facility of Station KRZZ(FM), San Francisco, California, and 8.6 kilometers from the licensed facility of Station KPFA(FM), Berkeley, California, a finding that CBJF does not dispute. AFR at 1. The minimum spacing requirement is 93 kilometers. See 47 C.F.R. § 73.807(a)(1). See also 47 C.F.R. § 73.870(c) (applications submitted during an LPFM filing window that fail to meet the spacing requirements of Section 73.807 will be dismissed “without any opportunity to amend.”).

³ Section 3(b)(2)(A) of Local Community Radio Act of 2010 (“LCRA”) granted the Commission the authority to waive Section 73.807. See Pub. L. No. 111-371, 124 Stat. 4072 (2011). See also *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15425 (2012) (implementing Section 3(b)(2)(A) of the LCRA). As discussed in the *Reconsideration Decision*, LPFM applicants were advised that a failure to file a second-adjacent waiver request would result in dismissal of the application without an opportunity to amend. See *Media Bureau Announces Availability of the Revised FCC Form 318 and the Filing Procedures for October 15 – October 29, 2013 Low Power Filing Window*, Public Notice, 28 FCC Rcd 8854, 8856 (MB 2013) (“Following the close of the window, the Commission staff will return and/or dismiss applications and amendments not submitted in accordance with the procedures described in this Public Notice. *No curative amendments for such applications and amendments will be accepted after the close of the window.* . . . An applicant should consider using a consulting engineer or a party familiar with the LPFM technical rules to determine the technical acceptability of its application, particularly if the applicant is requesting a second-adjacent channel spacing waiver.”)(emphasis added).

1934, as amended (“Act”) that the Commission make a fair, efficient and equitable distribution of licenses by treating LPFM and other services of stations differently.⁴ We disagree. Section 307(b) does not require that the Commission apply uniform processing rules to all radio services.⁵ The Commission retains the discretion to develop and apply processing policies.⁶ Accordingly, the Commission has adopted processing rules tailored to the unique characteristics of each service, particularly for processing applications submitted during filing windows.⁷ Thus, when the Commission established the LPFM service, it adopted Section 73.870(c) to prevent defective applications from delaying the processing of acceptable LPFM applications.⁸ The LCRA and subsequent orders in the LPFM proceeding did not address or otherwise modify Section 73.870(c). Moreover, to the extent that CBJF believes that Section 73.870(c) should be altered, the proper forum is a notice and comment rule-making proceeding.⁹

⁴ AFR at 2, citing 47 U.S.C. § 307(b).

⁵ CBJF’s argument fails to recognize that Section 73.870(c) of the Rules imposes merely a processing policy. It does not preclude second-adjacent waiver requests by LPFM applicants, but instead requires that such requests be submitted in the LPFM filing window rather than subsequently through an amendment. Such a processing policy does not constitute a Section 307(b) distribution of licenses or frequencies. CBJF claims that it “mistakenly forgot to include” such a waiver request with its Application. Petition for Reconsideration at 1 (dated Mar. 13, 2014).

⁶ 47 U.S.C. §§ 154(i) and (j). Section 4(i) of the Act authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent [with the express provisions of the Act], as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). See *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987) (the “wide-ranging source of authority” in Section 4(i) empowers the Commission to take “appropriate and reasonable” actions in furtherance of its regulatory responsibilities). Additionally, Section 4(j) of the Act gives the Commission authority to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” 47 U.S.C. § 154(j).

⁷ For example, the Commission will allow applicants in commercial auctions to cure site availability defects, but does not allow similar curative amendments for noncommercial educational (“NCE”) applicants. See *Christopher Falletti*, Letter, 28 FCC Rcd 6269 (MB 2013) (auction-winning applicant allowed to cure site availability defect); *MX Group 23*, Letter, 26 FCC Rcd 15135, 15140 (MB 2011) (disallowing amendment of a new NCE station application that lacked reasonable assurance of site availability). Similarly, in adopting new comparative procedures for NCE applicants, the Commission acknowledged that applications filed during different filing periods would be subject to different processing procedures. See, e.g., *Reexamination of Competitive Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132, 13136 (2002) (differences between applications filed under A/B cut-off procedures and those submitted in filing windows justify different processing policies).

⁸ See *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2257 (2000) (“In accordance with our window filing procedure for commercial broadcast applications, after the LPFM window closes, the staff initially will screen applications for the purpose of identifying those that are mutually exclusive and those that fail to protect existing broadcast stations in accordance with the standards adopted herein. Applications that fail to properly protect these existing stations will be dismissed without the applicant being afforded an opportunity to amend. This will increase the speed and efficiency with which LPFM applications can be processed by the staff.”). See also *Creation of a Low Power Radio Service*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208, 19264 (2000) (establishing Section 73.870(c)).

⁹ See, e.g., *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1984) (citation omitted) (“rulemaking is generally a ‘better, fairer and more effective’ method of implementing a new industry-wide policy”); *Sunburst Media L.P.*, Memorandum Opinion and Order, 17 FCC Rcd 1366 (2001) (stating “it has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rulemaking proceedings, not adjudications”); *Great Empire Broadcasting, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 (1999), citing *Capital Cities/ABC, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5888 (1996) (it is generally inappropriate to address arguments for a change in rules “where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record”).

3. CBJF also argues, for the first time on review, that Section 5 of the LCRA requires that LPFM and FM translator stations be treated equally, and thus “allowing translators curative amendment while barring LPFM applications the same option means translator applicants are given preferential filing treatment.”¹⁰ Section 5(c)(5) of the Act and Section 1.115(c) of the Rules bar applications for review that rely “on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass.”¹¹ CBJF never presented to the Bureau its argument that Section 5 of the LCRA requires allowing LPFMs to file amendments curing second-adjacent spacing defects. Accordingly, we will dismiss the AFR to the extent it relies on this argument.¹²

4. ACCORDINGLY, IT IS ORDERED that the Application for Review filed on June 26 2014, by Clifford Brown Jazz Foundation: (1) IS DISMISSED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Commission’s Rules,¹³ to the extent that it relies on questions of fact or law not previously presented to the Bureau; and (2) otherwise IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission’s Rules.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁰ AFR at 2.

¹¹ See 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission’s order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

¹² CBJF also argues that the Application, if amended, could be made a singleton. AFR at 3. Because we are denying CBJF’s request for reinstatement pursuant to Section 73.870(c), we need not consider this argument.

¹³ 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c).